



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 354 OF 2011

**NDETO NZIOKA ISAVI (Suing as the Legal Representative of the Estate
of KYUMA NDETO SINGI (Deceased)).....PLAINTIFF/RESPONDENT**

VERSUS

ABEDNEGO MUIWA JUMA.....1ST DEFENDANT/APPLICANT

GIDEON MUTUA JUMA.....2ND DEFENDANT/APPLICANT

RULING OF THE COURT

The Application

1. The applicant herein who is the Commissioner of Insurance has filed a Notice of Motion dated 16th February, 2016 seeking for stay of proceedings herein pending the end of moratorium declared by the statutory manager and extended for three months from 21st January, 2016 by the High Court, Nairobi vide Commercial Admiralty Division Misc. No.547 of 2012.

The Application is supported by the following grounds:-

- (1) THAT the applicants were not aware that moratorium dated 2nd November, 2011 was extended for three months from 21st January, 2016.
- (2) THAT the Defendants have been attending an inquest on the accident which is not yet over at Makueni Court.

The application is also supported by an affidavit of PAUL THOMAS MUINDI KISONGOA who deponed that he is the Advocate for the Defendants herein and seeks for this matter to be stayed ending the determination of an application lodged at Nairobi High Court and also to enable him file more witness statements in this matter.

2. The Application has been strenuously opposed by the Plaintiff/Respondent on the following grounds:-

- (1) THAT the moratorium order does not state that any of the parties herein is barred from pursuing this suit to its logical conclusion.
- (2) THAT the plaintiff is neither a creditor nor policy holder of Blue Shield Insurance Company Limited and that his claim is against the Defendants herein and not the Insurance Company.

(3) THAT the Plaintiff is aware that Section 676c of the Insurance Act does not deny legitimate suitors of their right to institute proceedings for tortuous acts of ...or breaches by the insured.

(4) THAT the moratorium orders attached to one Applicants application has since expired as same was to lapse on the 21st April, 2016.

(5) THAT the fact that the Defendant is attending an inquest is no bar to the continuation of the present proceedings.

(6) THAT the Applicants application is incompetent and should be dismissed with costs.

3. Parties agreed to canvass the application by way of written submissions. Counsel for the Defendants/Applicants submitted that this suit should be stayed pending the end of the moratorium declared by the statutory manager and that the Defendants be granted leave to file list of documents and further statements of witnesses. Counsel pointed out that already a statutory manager has been appointed in accordance with section 67c (2)(i) of the Insurance Act (CAP 487) and who has issued a moratorium vide **Nairobi HCCC No. 547 of 2011**. Further that the Defendants have been attending an inquest at Makueni Law Courts which is yet to be concluded. It was also submitted on behalf of the Defendants that it has become necessary to file additional documents and lists of witness statements herein. Counsel further submitted that stay should be granted in view of the fact that a similar suit between the parties is ongoing and to ensure that the Defendant is granted a fair hearing pursuant to Article 50(1) if the constitution.

Counsel for the Plaintiff/Respondent submitted that the Application should be dismissed for several reasons. Firstly, that the Plaintiff who is neither a shareholder nor policy holder of Blue Shield Insurance Company limited was not barred from pursuing this suit to its logical conclusion. Secondly, Section 67 (c) of the Insurance Act provides that a Statutory Manager may be appointed to assume the management, control and conduct of the affairs and business of an insurer. Thirdly the moratorium order has since elapsed. Fourthly, the Defendants claim that an request is ongoing is not a bar to the continuation of proceedings herein. The case of **IN THE MATTER OF CONCORED INSURANCE COMPANY [2014] eKLR** was relied upon.

4. Determination:

I have considered the Defendants Application as well as the submissions of the learned counsels. The following issues are necessary for determination namely:-

(1) Whether there should be an order of stay of proceedings herein.

(2) Whether the Defendants/Applicants should be granted leave to file list of documents and further statements of witnesses.

As regards the first issue, I note that the Defendants have indicated that a moratorium has been declared by a manager pursuant to the provisions of Section 67 c of the Insurance Act and as such wants this suit stayed. The Defendants have also alluded to the existence of an inquest which is still ongoing and which according to them should proceed while this case should be stayed until the same is finalized. There is need to delve into the clear provisions of Section 67 c (10) of the Insurance Act. It provides as follows:-

(10) For the purposes of discharging his responsibilities, a manager shall have power to declare moratorium on the payment of the insurer of its policy holders and other creditors and the declaration of a moratorium shall –

(a) be applied equally to all classes of policyholders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify;

(b) suspend the running of time for the purposes of any law of limitation in respect of any claim by

creditor of the insured.

(c) Cease to apply upon the termination of the manager's appointment whereupon the rights and obligations of the insurer, its policy holders and creditors, shall save to the extent provided in paragraph (b) be the same as if there had been no declaration under the provisions of this subsection.

The foregoing provisions of Section 67 c (10) of the Insurance Act clearly show that it is to affect only policy holders and creditors. In the present case the Plaintiff is neither a policyholder nor a creditor of the Insurance Company and therefore he is not to be affected by the said section. Indeed in the case quoted by the counsel for the Plaintiff **CONCORD INSURANCE CASE (supra)** the court held that Section 67 c (10) was not applicable to persons or parties who were neither policyholders nor creditors of the insurance company. The court went ahead to hold that the said section was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured for tortious acts or breaches and which does not interfere with duties of a manager to discharge his duties in relation to the revival of an insurance company. The court went further to hold that in cases that had not been successfully concluded to judgement stage in which case an insured or his insurer would be called upon to satisfy the same then issue of a moratorium might be entertained in regard to stay of proceedings. Looking at the Plaintiff's suit, I find the same is yet to be concluded and so far no judgment has been obtained and there is no declaratory suit against the Insurance company – Blue shield Insurance Company Limited. Hence I find that Section 67 c (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an Insured of an insurance company under receivership for tortious acts of or breaches by the insured. The moratorium is only intended to aid the statutory Manger to discharge his duties in relation to revivals of the insurance company and to handle policy holders or creditors and not third parties like the Plaintiff herein. Indeed Insurance Companies under receivership have often used the issue of moratorium as a shield to prevent third parties who have legitimate claims against their insured's from being prosecuted. If such is allowed, then third parties who are neither policy holders nor creditors stand to be prejudiced. As this case is yet to be heard and concluded and the fact that no judgment has been issued, I find the Defendants request for stay of proceedings not merited in the circumstances. Again it is noted that the moratorium that had been issued herein has since elapsed and therefore there is really nothing barring the Plaintiff from prosecuting his case to its logical conclusion. Again, the Defendants contention that an inquest is ongoing is not enough reason to prevent or stay these proceedings for the simple reasons that the said inquest is proceeding independently of these civil proceedings by dint of the provisions of section 193 A of Criminal Procedure Code.

As regards the second issue, I note the Defendant have indicated that new information or evidence has been received and thus they need to be given leave to file further list of documents and witnesses statements; I find there is no prejudice occasioned to the Plaintiff if the said leave is granted since it is fair and just to allow parties to a suit to be given an opportunity to present their respective cases and hence ensure all are on an equal footing. In any case this matter has not yet proceeded to hearing in earnest and therefore it is appropriate that parties be given the necessary opportunity to file and exchange documents.

The upshot of the foregoing observations is that the Defendants prayer for stay of proceedings herein is rejected. Defendant's prayer for leave to file list of documents and further witness statements is granted. The Defendants/Applicants are hereby ordered to file and serve further list of documents and witness statements within the next thirty (30) days from the date hereof. The Plaintiff to file further documents or witness statements if need be within thirty (30) days upon service. Costs shall be to the Plaintiff/Respondent.

Dated and delivered at Machakos this 9TH day of MARCH 2017.

D. K. KEMEI

JUDGE

In the Presence of:-

Kiranda – for Respondent.....

C/A: Muoti.....